Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1627

TEMPE ELEMENTARY SCHOOL DISTRICT No. 3, KENNETH J. FULLER, R. CRAIG ROVER, WILLIAM G. PAYNE, GEORGE M. SANCHEZ and JAMES R. PHILLIPS, Members, Tempe Elementary School District No. 3 Board of Trustees, in their official capacities, ERNEST F. BIVINS, in his capacity as Personnel Director, O. S. FEES, in his capacity as Superintendent of Schools, ANDREW R. AVILA, in his former capacity of Principal of Veda B. Frank School,

Petitioners,

v.

SOCORRO HERNANDEZ BERNASCONI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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*Petitioners,**

v.

SOCORRO HERNANDEZ BERNASCONI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled and numbered case on February 22, 1977.

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* Hereinafter "petitioner" refers to the school district and its administrative board and administrative employees in their official capacities.

Opinion Below

The judgment and opinion of the United States Court of Appeals is printed in Appendix A and reported in 548 F.2d 857. The order denying the Motion for Rehearing was entered April 8, 1977 and is printed in Appendix B. It is unreported. The opinion and judgment of the United States District Court, District of Arizona, was entered March 25, 1975 and is printed in Appendix C. It is unreported.

Jurisdiction

The judgement and opinion of the United States Court of Appeals for the Ninth Circuit was entered February 22, 1977. A Motion for Rehearing was timely filed by the petitioner March 7, 1977 and denied April 8, 1977. A petition for Stay of Mandate until May 8, 1977 pending a Petition for Certiorari was granted. This Petition for Certiorari was filed within the time required by Rule 22(3). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision Involved

First Amendment to the Constitution of the United States.

Questions Presented

Question I

Where a public school employee is qualified for either of two educational employment positions within a school district and where her transfer from one position to the other is partially motivated by her exercise of protected speech,

has the employee been denied a government benefit sufficiently valuable to require her reinstatement to her former position when she enjoys the same objective employment benefits (*i.e.*, the same pay, salary increases, level of responsibility, working conditions, and status in the educational community) in her present position as she enjoyed in the former position?

Question II

Is it error for the United States Court of Appeals to remand to the United States District Court for further findings on whether a public school employee would have been transferred to her new position even in the absence of protected conduct where the trial record is uncontroverted that her initial position became non-existent due to loss of federal funds?

Statement of the Case

On March 21, 1973, respondent, Socorro Bernasconi, filed suit against the petitioner, Tempe Elementary School District, in the United States District Court, District of Arizona, alleging that she was illegally transferred from the position of counselor at the Veda B. Frank School, Guadalupe, Arizona, to the position of teacher at the Rural School, Tempe, Arizona, because she had engaged in constitutionally protected free speech. The jurisdiction of the United States District Court was invoked because the case involved constitutional questions regarding individual rights under the First and Fourteenth Amendments to the Constitution of the United States. On March 25, 1975, the District Court entered judgment finding that the transfer was at least partially motivated by constitutionally impermissible reasons, but denied relief on the ground that since the transfer had not resulted in any loss of responsibility, pay, salary

increases, working conditions, or status within the eyes of the educational community, the respondent had not been denied a valuable (or cognizable) governmental benefit (Appendix C). The Ninth Circuit reversed on February 22, 1977, holding as a matter of law that since the respondent had suffered a transfer from one position to another due to her exercise of the freedom of speech, she was lawfully entitled to some remedy (Appendix A).

The respondent was first employed by the petitioner for the school year 1970-1971 and was assigned to the position of counselor at the Veda B. Frank School (TR pp. 105, 165, 308). The following school year, respondent was assigned to the position of second-grade elementary school teacher at the Rural School, located three and one-half miles from the Frank School (TR p. 183, ll. 13-20). For each year of her employment with the petitioner, the respondent has expressly agreed to teach and work in such assignment as the petitioner may from time to time assign her (TR p. 185, ll. 10-15). During the course of her employment, respondent has received all anticipated salary increases in accordance with the petitioner's salary schedules (TR p. 184, ll. 1-7). She has not been discharged by the District and continues to work at the present time as a classroom teacher within the District.

During 1970-71, respondent was the only counselor of five counselors employed by the petitioner who was paid with Title I federal public education funds (TR p. 165, ll. 2-13; p. 222, ll. 1-15). In January or February of 1971, the petitioner was informed that it may not be able to utilize Title I funds for a position of counselor in the District (TR pp. 310-11). On March 24, 1971, respondent received her teacher's contract for the 1971-72 school year, accompanied by a letter from the petitioner's personnel director indicating that the petitioner was having problems assuring the

existence of Title I funds for her counseling position for the following year, that there was no assurance that her position for the following year would be that of counselor, and that her position for the next year might be that of classroom teacher (TR pp. 197-98). Thereafter, respondent's contract of March 24, 1971 was signed and returned by her (TR p. 200). On May 14, 1971, the petitioner was informed that it would not be able to use Title I funds to finance any position of counselor (TR pp. 311-12). Consequently, due to the lack of federal funding, there was no position of counselor at the Frank School for the school year 1971-72 (TR p. 312, ll. 4-17). To maintain the counselor position at the Frank School would have required the abolishment of some other position or reduction of some program then financed with local or state funds (TR p. 312, ll. 18-25). In subsequent years the counseling position at the Frank School has been a part-time position funded by local funds, filled by an individual who acts as counselor at another of the petitioner's schools three days per week (TR pp. 216-17). On June 8, 1971, respondent received a memorandum notifying her of the closing of the counseling position, and consequently requiring her reassignment (TR pp. 211-12). On August 11, 1971, she received a memorandum defining specifically her reassignment to the position of teacher at the Rural School (TR p. 213).[1]

The District Court found that petitioner Andrew R. Avila, the principal of the Frank School, was primarily re-

[1] During the year 1970-71, the petitioner was also facing an extreme problem of teacher overstaffing, a severe cutback of state funds available to the petitioner, and a reduction in its teachers' staff at the Frank School due to voluntary desegregation of that school (TR 302-07). These limitations upon the petitioner's financial resources made it impractical for the petitioner to employ state and local funds to maintain a position of counselor at the Frank School (TR 312, ll. 4-25), or to allow the respondent to remain at the Frank School even as a classroom teacher (TR pp. 212-13).

sponsible for the respondent's transfer (Appendix C at 27a-28a). Over a period of months, Avila had been disappointed, frustrated and annoyed with the respondent's handling and creation of several problems regarding the school, its personnel, and the community in which the Frank School is located. Following an incident during the last week of April, 1971, when the respondent refused to comply with his instructions, Avila called the petitioner's personnel director, informing him that he wished to have the respondent transferred (TR pp. 89-91). Mr. Avila's reasons for requesting her transfer related to her insubordination (TR p. 90), gossip regarding other teachers (TR pp. 71-73), staff morale (TR p. 89), and differences in their philosophies (TR pp. 74-75). However, even assuming that Mr. Avila's request for her transfer was retaliatory, his decision to recommend her transfer was an ineffectual one. Prior to his decision in late April, 1971, the petitioner had already informed the respondent in February and on March 24 that there was a substantial chance that she would be transferred because of the possible unavailability of Title I funds for her present counseling position (TR pp. 197-98; 307-08).

Teachers and counselors of the petitioner are paid in accordance with the same salary pay schedule (TR p. 41, ll. 12-14), they have the same hours of employment (TR p. 184, ll. 8-11), the same working conditions, and have available to them the same general facilities (TR pp. 184-85). The petitioner makes no distinction with respect to the rank, grade or status of counselors and teachers (TR pp. 55-56; 215-16). Employees in both positions have been promoted to administrative jobs (TR pp. 40-41). Indeed, the unrebutted evidence indicates that the only difference between the two positions is the different function they perform in the educational system.

The Reasons For Granting the Writ

Question I

The issue involved in this case potentially affects the millions of U. S. citizens employed by state and federal governments. It is an important question within the considerations of Rule 19(1)(b) of the Revised Rules of the Supreme Court, and should therefore be decided by this Court.

In *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972), this Court stated:

> "[E]ven though a person has no 'right' to a *valuable government benefit* and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest—especially, his interest in freedom of speech." (Emphasis added.)

The above language has been quoted in scores of opinions and is the genesis of numerous cases in the federal courts. These cases and the reams of legal commentary on *Perry* v. *Sindermann*, subsequent related cases, and other related issues indicate that the law is far from settled on the rights of government employers and government employees following the denial of a valuable governmental benefit and an allegation that the denial was based on constitutionally impermissible reasons. Particularly, the circumstances of this case manifest the need for the adoption of an *objective standard* for determining whether an employee has been denied a governmental benefit that is, in fact, *valuable*.

In *Perry* v. *Sindermann*, this Court suggested the parameters of valuable governmental benefits which were to be protected from government infringement:

> "We have applied this general principle to denials of tax exemptions, unemployment benefits, and welfare payments. . . . But, most often, we have applied the principle to *denials* of public employment." 408 U.S. at 597 (citations omitted; emphasis added).

The "general principle" involved (protecting against the denial of valuable governmental benefits because of some constitutionally impermissible reason) has been invoked to protect benefits affecting a person's livelihood, financial security, and standard of living. But in no case has it been applied merely because the individual subjectively wanted or desired a particular form of benefit.

It is clear that termination of employment is a brutal means of restricting teachers and other governmental employees from exercising their constitutional rights. Consequently, it is well-settled that if the employee's constitutionally protected speech or activity is the motivating factor of the employee's dismissal, that he is entitled to reinstatement to his position. *See, e.g., Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Mt. Healthy City Board of Education* v. *Doyle*, —— U.S. ——, 50 L.Ed.2d 471, 481-484, 97 S.Ct. 568, 575-576 (1977). But is the mere transfer of an employee to another equivalent position an infraction of the constitutional rights of that employee? Has the employee lost a valuable governmental benefit where the transfer does not affect the employee's level of responsibility, pay, salary increases, working conditions, and status within the eyes of the professional

community; *i.e.*, employment benefits that are objectively ascertainable?

In many incidents, the transfer of an employee may be the best solution to relieving tension in a highly volatile situation, while at the same time preserving the employee's valuable governmental benefit of public employment. In the public school setting, for example, the transfer of an employee may be the best means of balancing that employee's professional future with administrative-personnel relations, co-worker harmony, and the best interest of the students. The Ninth Circuit decision apparently precludes even an administratively sound transfer, one wherein all applicable parties benefit, if the employee subjectively wishes to remain at the original position and can prove that the transfer was even partially motivated by some constitutionally protected activity. Such precedent may produce the bizarre result foreseeable in factual situations similar to those in the instant case; *i.e.*, the Ninth Circuit decision may be interpreted as requiring reassignment to a non-existing position, resulting in the special creation of that position to satisfy the employee's subjective expectations. Finally, even in cases involving the denial of public employment for impermissible reasons, it appears that reinstatement of the employee to a position of objective equivalency satisfies the vindication of the constitutional rights involved.[2]

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[2] Although addressing a different issue, this Court, in *Mt. Healthy City Board of Education* v. *Doyle*, —— U.S. ——, 97 S.Ct. 568, 575, 50 L.Ed.2d 471, 483 (1977), stated that "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct . . . ," indicating that some objective standard is appropriate in determining whether the denial of a valuable governmental benefit for some constitutionally impermissible reason has occurred. The respondent is in "no worse a position" at the Rural School than she was in at the Frank School prior to her

While this Court has entered numerous opinions regarding the rights of teachers and other governmental employees who have been *terminated* from their employment due to their exercise of constitutionally protected rights, it has never been presented with the issue whether a *transfer* of an employee from one position to another constitutes a denial of rights protected by the First Amendment. This case is, in fact, the first to determine or attempt to answer this issue in the federal courts.

The issue presented is an important one. The determination of this issue will affect the day-to-day administration of school districts and their relations with their employees. The existing decision may preclude and will inhibit the transfer of teachers within school districts. By implication, state and local governments and their agencies, and the federal government and its agencies, will also be inhibited in the transfer of their employees from one position to an objectively equal position as a means of resolving employee conflicts and other administrative problems which incidentally take on aspects and overtones of the exercise of free speech or other constitutionally protected activities. The Ninth Circuit decision, if allowed to stand, may seriously impair the management and efficiency of educational institutions specifically, and governmental agencies generally.

Question II

Even assuming that the respondent's constitutionally protected speech or activity was a "substantial factor" or a "motivating factor" in the principal's decision to recommend transfer, the fact remains that the position of coun-

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transfer. Consequently, even if the motivation behind her transfer was partially retaliatory, the "constitutional principle at stake is sufficiently vindicated."

selor at the Frank School was closed due to the lack of federal funds to finance the position, and therefore the respondent would have been transferred regardless of any protected speech incident. Consequently, the decision of the Court of Appeals should be reversed in light of the rule recently announced by this Court in *Mt. Healthy City Board of Education* v. *Doyle*, —— U.S. ——, 50 L.Ed.2d 471, 484, 97 S.Ct. 568, 576; namely, that a personnel decision of a school board will be upheld if the school board shows "by a preponderance of the evidence, that it would have reached the same decision [regarding the teacher's employment] even in the absence of the protected conduct." In *Mt. Healthy*, this Court treated the issue avoided by the Ninth Circuit, stating:

> "We are thus brought to the issue whether . . . the fact that the protected conduct played a 'substantial part' in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.
>
> A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the ruling enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. *The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not en-*

gaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

. . .

[T]he proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." —— U.S. ——, 50 L.Ed.2d at 482-84, 97 S.Ct. at 575-76 (emphasis added).

The evidence is unrebutted and the record is clear on its face that the position of counselor at the Frank School was going to be and was, in fact, closed because of the non-availability of federal funds (TR pp. 312-13; 216-17). Hence, the respondent would have been transferred to another position regardless of the First Amendment question, and therefore her transfer falls squarely in the holding of *Mt. Healthy* v. *Doyle*.

While the Ninth Circuit *infers* that the District Court found that retaliation was the *sole* reason for the transfer (Appendix A at 7a-8a), neither the trial record nor the District Court opinion substantiate that conclusion. The record is clear that there simply was *no* counselor position for anyone at the Frank School the year following the respondent's transfer. Further, the District Court's findings focused only on the subjective reasons that one individual (Mr. Avila, the school principal) had in recommending the

transfer of the respondent (Appendix C at 27a-28a), and did not focus on a record in which it was proved (without rebuttal) that the transfer would have occurred even if there had been no recommendation by Mr. Avila. Additionally, while the Ninth Circuit states that the District Court considered the issue of the loss of funds (Appendix A at 8a), the District Court seems, in fact, to have rejected even the consideration of the issue. Before this Court decided *Mt. Healthy*, the District Court concluded that once it had determined that the recommendation by Avila was retaliatory, the District Court was thereafter legally precluded from considering whether the transfer would have occurred even if no such recommendation had been made (Appendix C at 31a).

Because there was a complete and unrebutted showing that the respondent's transfer would have occurred anyway, the Court of Appeals was the appropriate court to enter a judgment consistent with this Court's *Mt. Healthy* decision. Therefore, the Circuit Court's remand to the District Court for further findings of fact on the issue was error.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

May 19, 1977

APPENDIX

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 75-2156

SORROCO HERNANDEZ BERNASCONI,

Appellant,

v.

TEMPE ELEMENTARY SCHOOL DISTRICT NO. 3; KENNETH J. FULLER, R. CRAIG ROVER, WILLIAM G. PAYNE, GEORGE M. SANCHEZ and JAMES R. PHILLIPS, Members, Tempe Elementary School District No. 3 Board of Trustees, in their official capacities; ERNEST F. BIVINS, in his capacity as Personnel Director; O.S. FEES, in his capacity as Superintendent of Schools; ANDREW R. AVILA, in his former capacity of Principal of Veda B. Frank School,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Before:

ELY and WALLACE, *Circuit Judges,*
and SOLOMON,* *District Judge.*

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* Honorable Gus J. Solomon, Senior District Judge for the District of Oregon, sitting by designation.

Appendix A

OPINION

ELY, *Circuit Judge*:

Mrs. Bernasconi, a public school teacher and counselor, appeals from the trial court's denial of relief on her claim that she was illegally transferred from her position at a certain school because of her national origin and because she had engaged in constitutionally protected free speech.[1] The District Court, sitting without a jury, dismissed the claims of national origin discrimination. It concluded, however, that the School District had indeed transferred the appellant in retaliation for her exercise of constitutionally protected free speech; nevertheless, the court denied relief on the ground that the transfer did not deprive Bernasconi of a "valuable governmental benefit."

FACTS[2]

Bernasconi is a Mexican-American, born and reared in the community of Guadalupe, the population of which consists primarily of Mexican-Americans and Yaqui Indians. She obtained a bachelor's degree from the University of Dayton, and a master's degree from Texas Tech University with special training in counseling children of Mexican-American ancestry. Among her professional skills is that of bilingual psychometry, or intelligence testing and interpretation. After completing her education, she returned

[1] The action was brought pursuant to 42 U.S.C. § 1983 (1970) and 42 U.S.C. § 2000e-5(f) (Supp. II, 1972). The plaintiff invoked the special jurisdiction of the federal courts to hear such claims. 28 U.S.C. § 1343(3), (4) (1970); 42 U.S.C. § 2000e-5(f)(3) (Supp. II, 1972).

[2] Essentially, the facts are taken from the unpublished opinion of the District Court.

Appendix A

to Guadalupe, where she was employed by the Tempe Elementary School District as a counselor at the Frank School during the school year 1970-71.

During the year, the appellant became concerned that children were being placed in classes for the mentally retarded because they were tested in English rather than in their native tongue. She attempted to correct this problem internally through contacts with the principal, one Avila, and the special services division of the School District. In the spring of 1971, Bernasconi, frustrated by the lack of action on the part of the school, advised certain parents of affected children to consult the local legal aid society. Relations between Bernasconi and the school authorities had by this time become significantly strained, with the result that she was denied access to the files of children placed in special education classes. The situation worsened in April, when Avila requested Bernasconi to obtain parental consent forms for the retesting of the children. Believing that *post hoc* authorization would require deception of local residents, Bernasconi refused. Avila then formally requested her transfer to another facility, although he had been considering the transfer for some time previously.

The plaintiff was transferred to the Rural School, a school attended primarily by well-to-do Anglo students. She sought reconsideration and the District's Board of Trustees conducted a hearing on August 24, 1971. The Board reviewed the transfer and affirmed the action. A letter of explanation was directed to the plaintiff on August 27, 1971, and, in part, the letter explained:

> The Board considered these factors in making its decision: the counseling position at Frank School is abolished for 1971-1972 because of the lack of federal

> funds for this position; there are no teaching vacancies at Frank School and there are vacancies in other schools in the district; at least in making transfers from Frank School a primary consideration has been that teachers in their first year of service have been considered first for a transfer; guidelines for transfers of teachers which were developed by our own teachers' professional organization were adhered to in making all transfers; *these guidelines provided that the principal make the final decision of who should be transferred* because only he knew what transfer would least affect his school's educational program; there has been a change in the enrollment patterns at Frank and other schools which makes transfer of teachers necessary. [Emphasis added.]

No counselor was employed at the Frank School during the 1971-1972 school year, but in subsequent years a part-time counselor was there employed.

As a result of a suit filed by the "Guadalupe Organization," with which the plaintiff's husband worked, the State of Arizona subsequently agreed, in 1972, that a proper evaluation of a child's intelligence and verbal skills required testing in the child's primary language. In conjunction with this litigation, all except one of the Guadalupe children named as plaintiffs in the suit were removed from the special education curriculum at the Frank School and returned to regular classes.

"Valuable Governmental Benefit"

The District Court, as previously noted, denied relief on the ground that the plaintiff suffered no loss of a "valuable governmental benefit," since her transfer involved no loss

of pay or status. The court's holding on this point appears to raise a question of first impression in our Circuit.

The term "valuable governmental benefit" originated in the opinion of the Supreme Court in *Perry* v. *Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1971), which dealt with the non-renewal of an untenured professor's contract of employment. The Court held that:

> ". . . even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible. . . ." *Id.* at 597, 92 S.Ct. at 2697.

We note initially that the above quotation must be read in light of the context from which it derived, i. e., the defendants' claim that Perry's interest in reemployment was only a benefit to be accorded by the college, and not a property right. In our case, the School District seizes upon the language employed by the Supreme Court to broaden First Amendment protection, and urges us to construe it as a *limitation* upon First Amendment rights. We do not reach this somewhat unusual interpretation of *Perry*, however,

because even if there is a point at which government action is so *de minimus* that it will not trigger a remedy for abridgement of First Amendment rights, our is not such a case. The transfer of Bernasconi from a position uniquely suited to her talents and desires is precisely the kind of action that is proscribed by *Perry*.

Other courts which have considered this question agree with the view that we take. In *Adcock* v. *Board of Education*, 10 Cal.3d 60, 109 Cal.Rptr. 676, 513 P.2d 900 (1973), the Supreme Court of California applied First Amendment protection to all administrative sanctions, noting that "[l]esser penalties than dismissal can effectively silence teachers and compel them to forego exercise of the rights guaranteed them by our Constitution." 109 Cal.Rptr. at 680, 513 P.2d at 904. The Fourth Circuit has held that a classroom teacher's public statements regarding his homosexual status did not justify his transfer from teaching to administrative work, even though without loss of pay.[3] In the light of the findings of the District Court in the present case, Bernasconi cannot lawfully be denied a remedy on this ground.

Retaliatory Transfer

In anticipation of a possible reversal on the "benefit" question, the School District urges that we set aside the District Court's finding that the transfer was based partially upon retaliation for the exercise of First Amendment rights. This, we decline to do. The court's finding in this respect is manifestly protected by the "clearly erroneous" standard of Rule 52(a), Fed.R.Civ.P.

[3] Acanfora was denied relief on the ground that he had consciously omitted his affiliation with a homosexual group in filling out his application for the teaching position.

The evidence need not have demonstrated that Bernasconi's complaints were the sole cause of her transfer. It was necessary only that she prove that her complaints "partially" motivated her transfer. *Gray* v. *Union County Intermediate Education District*, 520 F.2d 803 (9th Cir. 1975). On the other hand, in order to protect the interests of both Bernasconi and the School Board, the plaintiff's evidence must have demonstrated that the transfer's purpose was "to quell legitimate dissent" or "to punish expressive behavior." *Mabey* v. *Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976).

The District Court found that Avila, the principal of Frank School, was primarily responsible for the transfer even though other persons reviewed his decision. The personnel director for the District, Bivins, testified that the principal's decision on transfers is given "very serious consideration." In addition, a letter Mrs. Bernasconi received from the School Board informing her of the transfer and the results of the hearing stated that "principal make[s] the final decision of who should be transferred." Since no contrary evidence was introduced, the court's finding that Avila was responsible for the transfer cannot appropriately be held to have been clearly erroneous.

The record establishes that Avila initially sought to have Bernasconi transferred because of her complaints about the special education program. Bivins testified that although Avila did not communicate in writing his intention to transfer Bernasconi and the reasons therefor until May 3, 1971, Avila had discussed the transfer with him, Bivins, earlier in the spring of 1971. Most significantly, Avila testified at length of his disapproval of Bernasconi's complaints about the special education program, that he communicated his disapproval to her several times, and that

he requested her transfer because of her activities in connection with the special education program. Although the School District argues that Avila's reason for requesting the transfer was Bernasconi's insubordination, Avila's own contrary testimony rebuts this argument. The District Court's finding on this issue was supported by substantial evidence and is therefore not clearly erroneous.[4]

PICKERING V. BOARD OF EDUCATION

Finally, the School District argues that the balancing test suggested in *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), requires that we affirm the judgment. We note first that the trial judge conscientiously applied the *Pickering* test, as the following paragraph from the District Court's carefully considered remarks indicates:

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[4] We also reject two other attacks on this finding. The School District argues that funding problems were solely responsible for the decision not to retain Bernasconi as a counselor at the Frank School, and therefore, Avila's motivation was irrelevant. The District Court considered this issue with care and concluded that whereas funding problems may have necessitated some transfers in the district, Mrs. Bernasconi was singled out for transfer based on impermissible considerations. We agree that Bernasconi met the burden of showing that her protected speech was a "motivating factor" in her transfer. *Cf. Mabey* v. *Reagan*, 537 F.2d 1036, 1044-45 (9th Cir. 1976).

Next, the School District makes the argument that Bernasconi's pleadings charge only that she was transferred for her connection with the special education lawsuit, and that Avila had no knowledge of the lawsuit at the time he recommended her transfer. But the complaint, together with the pretrial statement, indicate that Avila's knowledge of the suit was not the only reason alleged for the transfer. In addition, Bernasconi alleged that Avila's knowledge of her activities, which culminated in the legal proceedings, contributed to his decision to request the transfer. Therefore, the School Board's argument in this respect is not well founded.

> In concluding that the plaintiff's communications constituted protected speech, the court has attempted to balance the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. *Ring* v. *Schlesinger*, 164 U.S. App.D.C. 19, 502 F.2d 479 (1974). The court has been attentive to the four factors noted in *Pickering* of (1) co-worker harmony, (2) interference with the regular operations of the schools, (3) sensitivity of the relationship between the speaker and the criticized superior, and (4) close contact between the speaker and the subject of the criticism. Where, as in the instant case, the public statements made by the plaintiff were directed primarily at a general practice rather than at named individuals, the court finds the balance to tip in favor of the teacher's right to speak. An important factor influencing the court's finding is the nature of the problem to which the plaintiff's communications addressed themselves: that is, a governmental practice which, in the context of the public schools, tended disproportionately adversely to affect a particular ethnic group. The court recognizes that the plaintiff's communications may have had the effect both of leading to a change in what had been standard operating procedure in the schools and of ruffling the feathers of some of the plaintiff's co-workers. That, even so, the plaintiff's right to speak ought to be protected in consonance with the first amendment's primary concerns.

Since the trial judge so carefully weighed the variety of complex factual circumstances involved, we accord to

his decision a great deal of deference. To us, however, *Pickering* and its progeny[5] appear to indicate that this court itself must strike the balance. Accordingly, we have ourselves undertaken a most careful review of the record. We agree with the conclusion of the district judge that the School District's interest in being free from general criticism cannot outweigh the right of a sincere, educational counselor to speak out against a policy she believes to be both harmful and unlawful. The disposition is not controlled by *Gray* v. *Union County Intermediate Education District*, *supra*, because there is absolutely no suggestion in our record that Mrs. Bernasconi engaged either in harassment, or in the deliberately insubordinate conduct of the plaintiff in *Gray*. As the Supreme Court noted in *Pickering*, each case presents significant and important varieties of factual circumstances that should properly affect the decision. While it may thus be impossible to fashion a general rule, we have no doubt whatsoever that the factual circumstances of the present case require that Bernasconi be granted relief.

Conclusion

Our determination that we cannot affirm the District Court's judgment on any of the grounds suggested by the School District requires us to consider the appropriate scope of our remanding Order. After the District Court issued its decision, the Supreme Court of the United States decided *Mt. Healthy City School Dist.* v. *Doyle*, —— U.S.

[5] *See Mabey* v. *Reagan*, 537 F.2d 1036 (9th Cir. 1976); *Gray* v. *Union County Intermediate Education District*, 520 F.2d 803 (9th Cir. 1975); *Duke* v. *North Texas State University*, 469 F.2d 829 (5th Cir. 1973); *Chitwood* v. *Feaster*, 468 F.2d 359 (4th Cir. 1972).

——, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The Court there decided that in situations such as that presented here, a school district must be allowed to show "by a preponderance of the evidence, that it would have reached the same decision regarding [the teacher's] employment even in the absence of the protected conduct." *Id.* at —— 97 S.Ct. at 576. In the present case, the School District presented evidence that the transfer of Bernasconi was based solely on federal funding problems.[6] The District Court appeared to reject that contention, but we think that adequately precise findings on the point were not made. If, on remand, the District Court concludes that the School District did not meet its burden of showing "that it would have reached the same decision as to [Mrs. Bernasconi's transfer] even in the absence of the protected conduct," then the District Court should forthwith proceed to fashion an appropriate remedy fitting the somewhat unusual circumstances and according to Bernasconi a fair measure of the relief to which she is entitled.

Reversed and Remanded.

[6] *See* footnote 4, *supra*.

APPENDIX B

Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 75-2156

SOCORRO HERNANDEZ BERNASCONI,

Plaintiff-Appellant,

v.

TEMPE ELEMENTARY SCHOOL DISTRICT No. 3, *et al.*,

Defendants-Appellees.

Before:

ELY and WALLACE, *Circuit Judges,*
and SOLOMON,* *District Judge.*

The Petition for Rehearing is denied.

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* Honorable Gus J. Solomon, Senior District Judge for the District of Oregon, sitting by designation.

APPENDIX C

Judgment of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

No. CIV. 73-182 Phx

SOCORRO HERNANDEZ BERNASCONI,

Plaintiff,

v.

TEMPE ELEMENTARY SCHOOL DISTRICT No. 3, *et al.*,

Defendants.

This action came on for trial before the court, Honorable William J. Lindberg, district judge, presiding, and the issues having been duly tried and a decision having been rendered,

IT IS ORDERED AND ADJUDGED:

That the plaintiff take nothing, that the action be dismissed on the merits.

DATED this 25th day of March, 1975.

WILLIAM J. LINDBERG
Senior United States District Judge

Appendix C

Memorandum of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

No. CIV. 73-182 PHX

SOCORRO HERNANDEZ BERNASCONI,

Plaintiff,

v.

TEMPE ELEMENTARY SCHOOL DISTRICT No. 3, *et al.*,

Defendants.

On March 21, 1973, Socorro Hernandez Bernasconi (plaintiff) commenced an action against Tempe Elementary School District Number Three and against the individual defendants named in the caption. The action was brought pursuant to the civil rights acts of 1871[1] and 1964;[2] the plaintiff invoked the special jurisdiction of the federal courts to hear such claims.[3] An amended complaint was filed on May 25, 1973. The defendants' motions to strike and to dismiss were denied by an order of the court entered on August 27, 1973. The defendants' motion for summary judgment was granted in part by the court on January 6, 1975; a partial judgment reflecting that ruling was filed on February 10, 1975. On October 7, 1974, a pretrial

[1] 42 U.S.C. §1983 (1970).

[2] 42 U.S.C. §2000e-5(f) (Supp. II, 1972).

[3] 28 U.S.C. §1343 (3), (4) (1970); 42 U.S.C. §2000e-5(f)(3) (Supp. II, 1972).

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order had been made part of the record by the court, and the issues remaining to be determined were tried thereunder, beginning on February 18, 1975. Although all rulings prior to trial had been made by Honorable Carl A. Muecke, one of the judges of the above entitled court, the trial was held before the undersigned judge, sitting in the District of Arizona upon special assignment. This post trial memorandum of decision constitutes the court's findings of fact and conclusions of law.[4]

The trial treated two issues: (1) Whether the defendants' action in transferring the plaintiff from a position as counselor in the Frank school to a position as teacher at the Rural school violated the plaintiff's right to freedom of speech. (2) Whether the defendants' action in transferring the plaintiff was based upon considerations of her national origin and was therefore violative of her right to the equal protection of the law and was, in addition, an unlawful employment practice as defined in the civil rights act of 1964.[5] The court has determined both of these issues adversely to the plaintiff, and the court has concluded that a judgment for the defendant ought to be entered.

The evidence supports the following summary of pertinent facts.

The Veda B. Frank school is located in the community of Guadalupe, Arizona, and lies within the jurisdiction of Tempe Elementary School District Number Three.[6] The

[4] FED. R. CIV. P. 52(a).

[5] 42 U.S.C. §2000e-2(a)(1) (Supp. II, 1972).

[6] In September 1973 the Frank school was desegregated as a result of a prior determination by the United States Department of Health, Education and Welfare that the school was a segregated school. The student population at the school is now approximately forty percent minority. In the HEW compliance letter directing desegregation, concern with the transfer of the plaintiff was ex-

population of Guadalupe is approximately fifty-five percent Mexican-American and approximately forty-five percent Yaqui. The plaintiff is a Mexican-American female who was employed as a counselor at Frank school for the school year 1970-1971, and was employed by the district for some time prior to that. The plaintiff was employed as a second grade teacher at the Rural school for the school year 1971-1972. The plaintiff was born and raised in the community of Guadalupe, speaks Spanish, and has a working knowledge of Yaqui. The University of Dayton awarded the plaintiff a bachelor's degree in education on July 30, 1967; the degree is supported by a satisfactory academic record. After she completed a program designed particularly to train individuals in counselling children of Mexican-American ancestry, the plaintiff was awarded a master's degree from Texas Tech University. Among plaintiff's professional skills is that of bilingual psychometry, or intelligence testing and interpretation. The plaintiff is the first individual in recent times to have come from Guadalupe and to have made significant academic achievements. It has been a career goal of the plaintiff to return to her community and help others achieve as has she.

In early 1972, a stipulation and order were filed in *Guadalupe Organization* v. *Tempe Elementary School District Number Three*, No. CIV 71-435 PHX. (D.Ariz., January 25, 1972, filed August 10, 1971). The stipulation was entered into by the plaintiffs and the so-called state defendants, who may be characterized as associated with the Arizona state board of education. The problem for which

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pressed, but resolution of the problem was left to the Equal Employment Opportunity Commission. Although a charge had been filed with the EEOC on August 29, 1972, no conciliation was achieved

redress was sought in *Guadalupe Organization* was this: Mexican-American and Yaqui Indian elementary school children, whose primary languages were Spanish or Yaqui, were being given intelligence tests by the Tempe public schools. The verbal portions of these tests were administered solely in English. As a consequence, a number of Guadalupe children, who had not scored well on the tests, were classified as mentally retarded and placed in special education classes. Stated briefly, the stipulation and order entered in *Guadalupe Organization* sought to cure this problem by requiring the state board of education to promulgate regulations governing the classification of students as mentally handicapped. The most important notion running throughout the stipulated regulations was that an elementary school student's intelligence and verbal skills, to be validly evaluated, ought to be evaluated in his primary language, the language of the home.

On May 17, 1972, an additional stipulation and order was entered in *Guadalupe Organization*. The stipulation was entered into by the plaintiffs and the defendants associated with Tempe Elementary School District Number Three. In that stipulation, the defendants agreed to follow the recently stipulated-to state regulations in placing children in special education classes. (*Compare, P.* v. *Riles*, 343 F.Supp. 1306 (N.D.Cal. 1972), *Aff'd*, 502 F.2d 963 (9th Cir. 1974)). The plaintiff's husband works with the Guadalupe Organization; the plaintiff in the instant case was not a party to the litigation brought by the Guadalupe Organization against the state and district. In conjunction with this litigation, all except one of the Guadalupe children named as plaintiffs in *Guadalupe Organization* were removed from the special education curriculum at the Frank school and returned to regular classes.

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On March 15, 1971, the plaintiff signed a contract with the district referable to the 1971-1972 school year. In that contract the following language appears [Ex. KK]:

> [The plaintiff] . . . during the period of this contract hereby agrees to teach such grade, grades, or subjects in the Tempe Elementary Schools as the superintendent of said schools may assign for the 1971-1972 school year . . . . Be it further agreed that reasonable rules and regulations prescribed or approved by the board of trustees shall be a part of this contract.

In the *Policies and Regulations of the Board of Trustees of Tempe School District Number Three*, Article IX, Section Five, the following language appears [Pretrial order (PTO) at 3]:

> Teachers are subject to transfer from position to position at the discretion of the Superintendent of Schools. When transfers are being considered, the personnel director shall confer with the employees concerned and shall review all reasons for the transfer and make recommendations to the Superintendent.

Mr. Ernest F. Bivens, who was at pertinent times the personnel director for the district, wrote to the plaintiff on March 24, 1971, in conjunction with her contract for the 1971-1972 school year. In the letter Bivens states [Ex. H]:

> At this time we do not know what federal funding will give us in the area of counseling and so we can make no assurances that your assignment for 1971-1972 will be that of counselor. You should realize this when and if you accept the contract and realize that your assignment may be that of a classroom teacher at any school in the district.

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Mr. O. S. Fees, who was at pertinent times the superintendent of schools for the district, held a meeting for first-year teachers on January 24, 1971. At that meeting, which the plaintiff attended, Fees stated that, because of enrollment and funding problems that had arisen in the district, first-year teachers would have to be placed in an unassigned pool and given assignments as openings occurred. [PTO at 3].

On May 3, 1971, Mr. Andrew R. Avila, who was then principal of the Frank school, wrote a letter to Mr. Bivens. The text of the letter is as follows [Ex. 3]:

> I hereby request the transfer of Mrs. Socorro Bernasconi from Veda B. Frank school. The reasons for making this request are of a personal nature. These involve differences in philosophy as well as staff and community relations. I believe that Mrs. Bernasconi is a very capable person who has a lot to offer children, both as a teacher and as a counselor. I have discussed this matter with Mrs. Bernasconi.

A handwritten note accompanied the letter. The text of the note is [Ex. 3]:

> Ernie: As you suggested - - - I did not give Mrs. Bernasconi a copy of this letter. /s/ Andy.

On June 8, 1971, Mr. Bivens dispatched a memorandum to a number of unnamed "teachers who do not have an assignment for next year." Among those receiving the memorandum was the plaintiff. Vacancies at schools in the district were listed and those to whom the memorandum was directed were asked to contact principals at the

schools preferred. [Ex. J].[1] On August 11, 1971, Mr. Bivens wrote directly to the plaintiff indicating vacancies which were available in the district for her. [Ex. K]. Protesting her transfer, the plaintiff wrote a letter to the district which was received on August 13, 1971. [PTO at 3]. A response was sent by Mr. Bivens on August 17, 1971. [Ex. BB]. In the response, changes in federal funding requirements were offered as the reason for the transfer of the plaintiff.

After the plaintiff, seeking reconsideration of her transfer, contacted the district board of trustees, a hearing was held before the board on August 24, 1971. The board reviewed the transfer and affirmed the action. A letter of explanation was directed to the plaintiff on August 27, 1971. In that letter the following appears [Ex. M]:

> The Board considered these factors in making its decision: the conseling position at Frank School is abolished for 1971-1972 because of the lack of federal funds for this position; there are no teaching vacancies at Frank School and there are vacancies in other schools in the district; at least in making transfers from Frank School a primary consideration has been that teachers in their first year of service have been considered first for a transfer; guidelines for transfers of teachers which were developed by our own teachers' professional organization were adhered to in making all transfers; *these guidelines provided that the principal make the final decision of who should be transferred* because only he knew what transfer would least affect his school's educational program; there has been a change in the enrollment patterns at Frank and other school which makes transfer of teachers necessary. [Emphasis added].

[1] The phrase "MAILED TO" and the list of six names noted at the top of Exhibit J were added subsequent to mailing by personnel department staff. The phrase and list were not on the memorandum actually received by the plaintiff.

No counselor was employed at the Frank school during the 1971-1972 school year. Of three counsellors who have served at Frank school subsequently and who have come to the attention of the court, two were of Mexican-American extraction. [Exs. W, X]. Mr. Andrew R. Avila is likewise Mexican-American.

Mr. Bivens' testimony was taken at trial on February 19, 1975. Mr. Bivens indicated that normally a *principal's recommendation for transfer is given very strong consideration* by his administrative superiors, because the principal is responsible for staff relations, morale, and everything that occurs in a given school. Mr. Bivens stated that he knew as early as spring 1971 that Mr. Avila was recommending the transfer of the plaintiff from Frank school. According to Mr. Bivens, the letter from Mr. Avila to Mr. Bivens [Ex. 3] was a formalization of the principal's previously expressed intentions. Mr. Bivens noted that, insofar as pay and hours are concerned, there is no difference in the district between counsellors and teachers. But Mr. Bivens observed that a counsellor has to be specially certified by the state. Mr. Bivens also noted that no other counsellors in the district had been transferred when the plaintiff was transferred. Mr. Bivens stated that the plaintiff's transfer resulted from problems with federal funding and that her national origin did not influence the decision in any way.

Mr. Fees' testimony was taken at trial on both February 18 and February 19, 1975. Mr. Fees' view of the facts sup-

ported that of Mr. Bivens in many respects; in particular, they agreed as to the existence of state requirements for counsellor certification, the lack of wage and hour differences between counsellors and teachers, the federal funding problem as the basis for the plaintiff's transfer, and the fact that the plaintiff's national origin did not influence the transfer decision. Mr. Fees also testified that, as early as March 1971, he was aware that problems existed in the special education program at Frank school and that the plaintiff had indicated children were in the program who did not belong there. Mr. Fees stated that on or before April 2, 1971, he was aware that the plaintiff had talked to the parents of affected children concerning the special education program. Mr. Fees stated that the plaintiff had acted properly in questioning the classification of certain children enrolled in the Frank school special education program and in bringing the matter to the attention of the district authorities. Mr. Fees indicated that bringing the special education problem to the attention of parents of affected children was also, in his opinion, proper. Mr. Fees felt that the plaintiff had acted improperly when she in August 1971, wrote a letter to an editor concerning the placement of children in special education classes. Mr. Fees stated that during the 1970-1971 school year, to his knowledge, the plaintiff had been performing her duties satisfactorily and she had never been called in for a personal conference with Fees.

Mr. Andrew Avila testified on February 18, 1975. Mr. Avila stated that during the school year 1970-1971 the plaintiff began by satisfactorily performing her duties. According to Mr. Avila, the plaintiff informed him about the problem of misplaced children in the Frank school special education program. Mr. Avila recalled a meeting

between himself and the plaintiff on February 25, 1971, during which he asked the plaintiff whether she had been suggesting that the local legal aid society be consulted by parents and misplaced children. Mr. Avila felt sure that the plaintiff had begun to discuss the special education problem with him no later than March 1971. On March 1, 1971, Mr. Avila wrote to the plaintiff and forcefully instructed her not to involve herself with the placement and removal of children in special education classes. Mr. Avila stated in the letter that he had been directed so to instruct the plaintiff by Mr. Robert Curry, then associate superintendent of schools for the district. [Ex. 4]. Mr. Avila stated that he did not agree with the plaintiff's view of the circumstances; rather, Mr. Avila thought then that children who were placed in special education classes were in fact mentally retarded and had not been subjected to invalid testing procedures. Mr. Avila now agrees that the new state regulations are useful in alleviating classification problems caused formerly by testing children's intelligence quotient in other than their primary language.

Mr. Avila stated that he was at that time of the opinion that the plaintiff facilitated the presentation to the local legal aid society of the case of the misplaced students. After he had expressly told the plaintiff not to do so, according to Mr. Avila, such behavior on her part was insubordinate. Mr. Avila stated that he felt the plaintiff was fomenting dissent; and Mr. Avila expressed the opinion that teachers should not speak out in the community even where what is being said is true. Mr. Avila added that he wrote his letter of May 3, 1971, [Ex. 3] because the plaintiff was involving herself in community affairs, talking too much and, according to Mr. Avila, thereby indulging in unprofessional behavior. Mr. Avila indicated that he had re-

ceived complaints from certain named teachers about the plaintiff and her spreading gossip. Mr. Avila felt that statements made by the plaintiff about other teachers at Frank school damaged morale and would affect the quality of education provided there.

According to Mr. Avila, his decision to request the transfer of the plaintiff became firm after the plaintiff declined to follow his instruction to go out in the community and gather signatures from parents permitting the reevaluation of certain students affected by the special education program. According to Mr. Avila, the gathering of such signatures was required by law. Mr. Avila stated that the plaintiff refused to gather the signatures because the activity was against her principles. Mr. Avila indicated that no consideration of the plaintiff's national origin was involved in his decision to recommend her transfer. Mr. Avila is no longer principal of the Frank school.

The plaintiff testified on February 18, 1975. Much of her testimony indicated her close involvement with the community of Guadalupe, her academic background, and her special training in counselling. The plaintiff also discussed the ethnic makeup of the community and her particular language skills. The plaintiff then turned to her role in the resolution of the special education problem at the Frank school. According to the plaintiff, through her dealing with the children in the special education program, she developed the opinion that some had been placed in the program improperly and as a result of low scores achieved on the familiar Wechsler intelligence test for children. The test had been administered to Spanish and Yaqui speaking children in English.

The plaintiff stated that, having become aware of this problem during the 1970-1971 school year, she tried to cor-

rect the matter internally. According to the plaintiff, she spoke with Mr. Avila and with Kay Murphy, who was a district employee assigned to the special services division. The plaintiff evidently suggested that retests of certain children be made and that certain parents be contacted. According to the plaintiff, the parents of some of the children who had been placed in special education classes were unaware of the fact of such placement. According to the plaintiff, corrective efforts on the part of the administration were not apparent. Therefore, on February 24, 1971, the plaintiff informed Mr. Avila that if something were not done, he was leaving himself "wide open for a law suit." On February 25, 1971, Mr. Avila confronted the plaintiff and stated to her that he had received a telephone call from Mr. Curry concerning the plaintiff's referring of special education children to the local legal aid society. Thereupon the plaintiff telephoned Mr. Curry and explained her concern. Mr. Curry set up a meeting where the plaintiff was permitted to discuss her views with members of the special services division and with Mr. Avila and Mr. Curry.

After the meeting, the plaintiff testified, she was instructed not to look at files concerning children placed in special education classes. According to the plaintiff, a counsellor routinely has access to these files in order to assess student progress and to propose solutions to given problems. Moreover, the plaintiff received the March 1, 1971, letter containing information which Mr. Curry directed Mr. Avila to pass along to the plaintiff. [Ex. 4]. Later the plaintiff learned that retesting of certain of the children in the special education program would occur. In the middle of March 1971, according to the plaintiff, she advised certain parents of the affected children to consult the local legal aid society. She offered this advice, accord-

ing to her testimony, because even by this time nothing in the way of corrective activity on the part of the district administration had occurred. It was only at the end of March or the beginning of April 1971 that actual retesting of the affected children began.

The plaintiff has described her refusal to gather signatures authorizing retesting in the following manner: After the retesting program had begun, Kay Murphy determined that written parental consent to the retesting was required for the file. Representatives of the administration were unsuccessful in procuring the number of parental signatures needed. Therefore the plaintiff, who enjoyed the special confidence of members of the Guadalupe community, was asked to go out and talk the appropriate parents into signing consent forms. Because the procurement of signatures authorizing retesting was being done *post hoc,* the plaintiff refused, feeling that she would be participating in the deception of local residents were she to ask for the signatures. The plaintiff stated that, although Mr. Avila indicated that her transfer was requested because she had refused to gather signatures, that in her opinion the change in assignment had occurred to punish her for speaking out and to deter any future activity on her part in the community. The plaintiff stated that she passed useful information along to her husband to facilitate the Guadalupe Organization in its efforts to bring suit against the district. The plaintiff has also stated that her transfer resulted from considerations of her national origin. In support of this view, the plaintiff noted that the individual who followed her (after a year's hiatus) as counselor at Frank school was a non-Spanish speaking, allegedly less qualified Caucasian, and the plaintiff noted that the district had not paid her for a week's work which she had performed several years earlier.

The plaintiff testified that her employment with the district has not been terminated, nor has threat of termination been made against her. The plaintiff noted that she has suffered no decrease in pay and has received the appropriate salary increases as her years of service with the district have passed. The plaintiff indicated that she works the same hours as she would have had she been the Frank school counselor and that the working conditions are the same, save that she is employed in the Rural school, some three and one half miles from the Frank school. The student body of the Rural school is approximately ninety percent "Anglo" and, instead of being composed of the desperately poor, is composed of the children of the well-to-do. The plaintiff has admitted that her contract with the district permitted them to assign her as need warranted. The plaintiff has reapplied for the Frank school position.

Other evidence and testimony was offered at trial bearing on both the issue of freedom of speech and that of discrimination based upon national origin. The summary above touches on the evidence deemed most pertinent by the court.

It is the opinion of the court that the evidence warrants finding the following as fact: Although Mr. Bivens, Mr. Fees and the district board of directors all reviewed the propriety of transferring the plaintiff such deference was given to the wishes of Mr. Avila that the transfer decision was essentially his alone. Mr. Avila did not single out the plaintiff for transfer because he was aware of federal funding problems concerning the counselor position at the Frank school. Mr. Avila did not single out the plaintiff for transfer solely because she refused to gather parental signatures. Therefore, that the plaintiff's refusal may

have been warranted is peripheral to our discussion. Mr. Avila did single out the plaintiff for transfer because he was exasperated by her activities in the school, in the community, and especially in suggesting legal action to the parents of affected children, all of which activities were concerned with the misclassification as mentally retarded of Mexican-American and Yaqui children attending the Frank school. Mr. Avila's decision was retaliatory.

Mr. Avila's decision to request the plaintiff's transfer did not derive from considerations of her national origin, because Mr. Avila himself is a Mexican-American. More importantly, Mr. Avila's decision to request the plaintiff's transfer did not derive from considerations of her national origin, because it clearly derived from the principal's displeasure with the plaintiff's divulging of the special education problems to the community of Guadalupe. District administration determinations not to place the plaintiff, upon subsequent application, as a counsellor at the Frank school did not derive from considerations of her national origin because two of the three counsellors who followed the plaintiff at Frank school were themselves of Mexican-American extraction. District administration determinations not to place the plaintiff, upon subsequent application, as a counsellor at the Frank school derived both from considerations of her qualifications vis-a-vis other applicants and from those factors which had originally led Mr. Avila to request her transfer.

The contract signed by the plaintiff (as well as state law and the district rules and regulations) permit the district administration in its informed discretion to transfer an employee from school to school and from a job as teacher to a job as counselor. The plaintiff has not suffered a demotion. The plaintiff has not been subjected to

any loss of wages. The plaintiff has not been required to work more hours to earn her wage as a classroom teacher than as a counselor. The plaintiff has regularly received salary increases when due. The plaintiff has not presently lost her employment as a result of her communications to Guadalupe residents. It appears that the plaintiff will not be subjected to a loss of employment as a result of her communications to Guadalupe residents. Therefore, the plaintiff has not been denied a valuable governmental benefit.

The Supreme Court has recently had occasion to treat first amendment claims like that of the plaintiff. *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Pickering* v. *Board of Education of Township High School Dist. 205*, 391 U.S. 563 (1968). Those cases support the proposition that the first amendment prohibits the denial of a valuable governmental benefit in retaliation for the exercise of the constitutional right of free speech.

The court is of the view that the plaintiff's communications to her husband, to members of the Guadalupe community, and to a newspaper editor, constituted protected speech. As the Court said in *Pickering*, 391 U.S. at 574:

> Statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.

The court in *Pickering* also noted that teachers are, as a class, the members of a community most likely to have informed and definite opinions on matters of school operation, and that it is accordingly essential that teachers be able to speak out freely on such questions without fear of

retaliation. *Pickering* v. *Board of Education of Township High School Dist. 205*, 391 U.S. 563, 572 (1968).

In concluding that the plaintiff's communications constituted protected speech, the court has attempted to balance the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. *Ring* v. *Schlesinger*, 502 F.2d 479 (D.C.Cir. 1974). The court has been attentive to the four factors noted in *Pickering* of (1) co-worker harmony, (2) interference with the regular operations of the schools, (3) sensitivity of the relationship between the speaker and the criticized superior, and (4) close contact between the speaker and the subject of the criticism. Where, as in the instant case, the public statements made by the plaintiff were directed primarily at a general practice rather than at named individuals, the court finds the balance to tip in favor of the teacher's right to speak. An important factor influencing the court's finding is the nature of the problem to which the plaintiff's communications addressed themselves: that is, a governmental practice which, in the context of the public schools, tended disproportionately adversely to affect a particular ethnic group. The court recognizes that the plaintiff's communications may have had the effect both of leading to a change in what had been standard operating procedure in the schools and of ruffling the feathers of some of the plaintiff's co-workers. That, even so, the plaintiff's right to speak ought to be protected in consonant with the first amendment's primary concerns.

The court has been troubled by the fact that federal funding problems may have required staffing readjustments within the district. It is necessary that a district, through

its agents, have the power to adjust staff assignments where matters of finance require adjustments. Today's ruling does not derogate from the district's power to act in proper circumstances. In the instant case, the court is confronted with circumstances where the district, cognizant that some employee might be, of necessity, subjected to transfer, selected the transferee for impermissible reasons. If the transfer were even in partial retaliation for the plaintiff's exercise of first amendment rights, it is of no avail to the district that financing problems required some staff readjustment. *Gieringer* v. *Center School District No. 58*, 477 F.2d 1164 (8th Cir. 1973); *Fluker* v. *Alabama State Board of Education*, 441 F.2d 201, 210 (5th Cir. 1971) (Thornberry, J.).

The court has thus concluded that the district has retaliated against the plaintiff for her exercise of the constitutional right of free speech; however, the court has found as a fact that there has been no demotion and no denial of a valuable governmental benefit in conjunction with the retaliation, and it is for that reason that the plaintiff is entitled to no relief on this claim. Research has led the court to many cases where a demotion or transfer was involved: *Washington* v. *Board of Education, School District 89, Cook County, Illinois*, 498 F.2d 11 (7th Cir. 1974), principal demoted to classroom teacher and transferred; *Acanafora* v. *Board of Education of Montgomery County*, 491 F.2d 498 (4th Cir. 1974), homosexual teacher transferred to non-teaching position; *United States* v. *Board of Education of Lincoln County, Georgia*, 469 F.2d 1315 (5th Cir. 1972), black guidance counselor demoted to classroom teacher at same rate of pay; *Springston* v. *King*, 340 F. Supp. 314 (W.D.Va. 1972), guidance counselor demoted to classroom teacher at same rate of pay. With the exception

of the Lincoln County, Georgia, case, where the court assumed that a reassignment from counselor to classroom teacher constituted a demotion, the court's research has suggested that some serious damage to wage or status must result from school district action before it can be said that a valuable governmental benefit has been denied to an individual employee. The court finds no such damage in the instant case; and the court expressly predicates its holding on the assumption that the plaintiff's employ with the district, insofar as it might have been threatened by her activities concerning the special education problem, is secure.

The court concludes that the plaintiff has failed to meet its burden of proving that any district action taken with respect to the plaintiff arose from considerations of her national origin. For this reason the court will not further discuss the plaintiff's claim founded upon this point.

In an action brought under the civil rights acts, a court may award damages for the emotional and mental distress caused by an intentional tort. *Donovan* v. *Reinbold*, 433 F.2d 738 (9th Cir. 1970). The court has explored the possibility of characterizing this action as one seeking such an award, but finds that the evidence presented is insufficient to warrant taking such action.

The plaintiff has also requested from the court an award of attorney's fees and exemplary damages. Even in the absence of actual damages, punitive damages may be awarded for a civil rights act violation. Punitive damages may be awarded where willful or malicious violations of constitutional rights have been proved, or where a defendant has acted wilfully and in gross disregard for the rights of the complaining party, or where the defendant has acted with knowledge that he was violating the plaintiff's rights or with reckless disregard of whether he was violating such

rights. *Stolberg* v. *Members of the Board of Trustees for the State Colleges of the State of Connecticut*, 474 F.2d 485 (2nd Cir. 1973). The court finds that the action taken against the plaintiff derived more from exasperation than from malice, and that an award of exemplary damages would, under the circumstances, be unwise.

The award of attorney's fees is restricted to the exceptional case and turns on whether the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy, or where a defense has been maintained in bad faith, vexatiously, wantonly, or for oppressive reasons. *Stolberg* v. *Members of the Board of Trustees for the State Colleges of the State of Connecticut*, 474 F.2d 485 (2nd Cir. 1973). In light of the court's ruling, it cannot be said that the district here was acting unreasonably or in bad faith in resisting the plaintiff's suit. Thus an award of attorney's fees ought not be made.

The clerk of the court is directed to send an uncertified copy of this memorandum to counsel for each of the parties, and to the plaintiff, Mr. O. S. Fees, Mr. Ernest Bivens, and Mr. Andrew Avila.

DATED this 25th day of March, 1975.

William J. Lindberg
Senior United States District Judge

Supreme Court, U. S.
FILED
JUN 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1627

TEMPE ELEMENTARY SCHOOL DISTRICT NO. 3, KENNETH J. FULLER, R. CRAIG ROVER, WILLIAM G. PAYNE, GEORGE M. SANCHEZ and JAMES R. PHILLIPS, Members, Tempe Elementary School District No. 3 Board of Trustees, in their official capacities, ERNEST F. BIVINS, in his capacity as Personnel Director, O. S. FEES, in his capacity as Superintendent of Schools, ANDREW R. AVILA, in his former capacity of Principal of Veda B. Frank School,

Petitioners,

v.

SOCORRO HERNANDEZ BERNASCONI,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent requests that the Court deny issuance of a Writ of Certiorari herein.

STATEMENT OF THE CASE

This case has been remanded by the Ninth Circuit Court of Appeals to the trial court for further factual findings and, should said findings be favorable to the Respondent herein,

the fashioning of appropriate relief. No remedy of any kind has been ordered by any court at this time.

ARGUMENT

It should be noted that of the two questions presented to the Court, the first assumes that the Petitioner has been required to reinstate Respondent to her former position. The second contends that the Ninth Circuit Court of Appeals misapprehended the trial court's record and therefore, is a plea for a new finding of fact from the trial record.

The Petition fails to present substantial reasons for granting a Writ of Certiorari for the reason that the questions presented are not ripe, are not sufficiently important, and do not present any substantial conflicts in lower court law.

Ripeness

In view of the fact that no court has offered the Respondent any remedy at all at this point, Petitioner's search for review of Mrs. Bernasconi's "reinstatement" (Question 1) is obviously premature. She may be granted any number of other types of remedy.

Further, the Ninth Circuit's recognition that this case may fit the *Mt. Healthy* situation, and its subsequent remand for further factual findings, makes review on Certiorari premature here. *Mt. Healthy City Board of Education v. Doyle*, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).

After the decisions yet to be made by the lower court on these two issues, the Petitioner may not even want Supreme Court review.

Importance

If this case is determined to fit the *Mt. Healthy* guidelines, it will have no more importance than any other Circuit Court case following U.S. Supreme Court precedent.

Petitioner's warning that millions will be affected by this decision gives little insight as to how the case, as it now stands, will affect those millions.

The Ninth Circuit readily admitted in its decision that there may be any number of cases in which governmental authorities may abridge employees' First Amendment rights and still leave those employees without remedy:

> "We do not reach (the Petitioner's) somewhat unusual interpretation of *Perry*, because even if there is a point at which governmental action is so *de minimis* that it will not trigger a remedy for abridgement of First Amendment rights, ours is not such a case. The transfer of Bernasconi from a position uniquely suited to her talents and desires is precisely the kind of action that is proscribed by *Perry*." (Parentheses added) *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972).

The Court simply pointed out that there would remain some abridgments so gross, such as the Petitioner's, that the Court could not look away.

Petitioner offers no reasons advancing the importance of the second question presented. Respondent knows of no legal principle requiring an appeals court to decide an issue on facts it considers insubstantial, without remand.

Conflict

Effort is made to create an illusion of conflict between this case and *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), when none exists. The Ninth

Circuit, in the citation above, pointed out the lack of conflict.

While *Perry* concludes that a governmental entity cannot deny a valuable governmental benefit for constitutionally impermissible reasons, it does not conclude that such a denial is the only governmental act which may be proscribed if improperly motivated. Petitioner would argue that, if murder is punishable by death, no death penalty could be prescribed without a finding of murder. They argue that if the *Perry*-style denial is not shown there is no wrongdoing.

A number of courts, including the Ninth Circuit, have treated improperly motivated governmental actions not involving the denial of benefits. These cases, which are fairly uniform in their treatment of the problems, are ones in which a governmental authority exercised its otherwise legitimate powers to silence dissent or for some other constitutionally impermissible reason. Denial of valuable governmental benefits was not found and did not need to be found in these cases. *cf. Acanfora v. Board of Education of Montgomery County*, 491 F.2d 498, 9 F.E.P. 1287 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974); *Adcock v. Board of Education*, 10 Cal. 3d 60, 109 Cal. Rptr. 676, 513 P.2d 900 (1973); *United States v. Gadsden County School District*, 539 F.2d 1369 (5th Cir. 1976); *Cooke v. Orange Belt District Council of Painters*, 529 F.2d 815 (9th Cir. 1976).

CONCLUSION

For those reasons set forth above, Respondent respectfully requests the Court to deny Petitioner's request for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

Dated June 16, 1977

Jerry Levine

JERRY LEVINE
THEODORE C. JARVI
Attorneys for Respondent